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Supreme Court, U.S.  
FILED

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No. 05 -

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In The

Supreme Court of the United States

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DONNA SCHEIBLER, and  
WILLIAM SCHEIBLER, her husband,  
*Insured/ plaintiff,*  
Petitioner,

v.

HIGHMARK BLUE SHIELD,  
*Insurer/ defendant,*

THOMAS J. HARDIMAN,  
United States District Court Judge,

Respondents.

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On Petition for *Writ of Certiorari* to the  
United States Court of Appeals for the Third Circuit

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Petition for *Writ of Certiorari*

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## **QUESTIONS PRESENTED**

**I. Whether preemption of Petitioner's insurance claim constituted a 14<sup>th</sup> Amendment violation?**

- a) Savings Clause exception for insurance laws;
- b) Preemption inequitable to 'plan' participants;
- c) Jurisdiction invoked in Barber denied here;
- d) Respondent Answer: #6 *not ERISA* insurer.

ANSWER: Yes.

**II. Whether lower courts modified or abridged the statutory rights and duties of the parties, in violation of the Fourteenth Amendment?**

- a) Applied no fiduciary standard of review;
- b) Made procedural rulings in *bias* or *error*;
- c) Incorrectly applied law to dismissal;
- d) Abridged right to amend federal claims;
- e) Incorrectly applied law on *recusa* motion.

ANSWER: Yes.

**III. Whether assigning Writ of Mandamus to second panel of judges, with two appeals pending before first panel of judges in the underlying action, prejudiced Petitioner?**

ANSWER: Yes.

**Preemption of 42 Pa. C.S. s 8371 Bad Faith**

Medical Insurance Claim  
Rehearing *en banc* denied;  
*Writ of Mandamus on Recusal* denied,  
By the Court of Appeals for the Third Circuit.

**PARTIES**

DONNA SCHEIBLER, and  
WILLIAM SCHEIBLER, her husband,  
*Insured/ plaintiff,*

Petitioner,

v.

HIGHMARK BLUE SHIELD,  
*Insurer/ defendant,*

THOMAS J. HARDIMAN,  
United States District Court Judge,

Respondents.

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### Cases

Aetna Health Inc. v. Davila, 124 S.Ct. 2488 (2004).

Angelastro v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935 (1985).

Black & Decker Plan v. Nord, 123 S.Ct. 1965 (2003).

Carey v. Phipus, 435 U.S. 247 (1978)

City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463 (3d Cir. 1993).

Coles, et al v. Street, 38 Fed. Appx. 829 (3d Cir. 2002).

Firestone Tire v. Bruch, 489 U.S. 101 (1989).

Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

Pinto v. Reliance, 214 F3d 377 (3d Cir. 2000).

Quakenbush v. Allstate, 517 U.S. 707, 712 (1996).

Selkridge v. United of Omaha, V.I., 01-cv-00143, (3d Cir. 2004).

Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc., 298 F3d 191, 199 (3d Cir. 2002).

Stratton v. E.I. Dupont De Nemours & Co., D.C. No. 02-cv-02131, (3d Cir. 2004).

### **CITATIONS TO OPINIONS/ORDERS BELOW**

District court, 04-cv-1928, dismissed bad faith claim with prejudice, February 1, 2005.

District court, 04-cv-1928, denied reconsideration, March 11, 2005.

District court, 04-cv-1928, denied petition to amend the complaint, April 13, 2005.

District court, 04-cv-1928, denied reconsideration of petition to amend, April 25, 2005.

Appeal court, No. **05-1717**, order to submit statement of appellate jurisdiction, due March 18, 2005.

Appeal court, No. **05-1717** and **05-2527**, *sua sponte* order to consolidate and dismiss the appeals, SLOVITER, FUENTES, NYGAARD, Circuit Judges.

### **JUDGMENTS TO BE REVIEWED (Rule 12.4)**

Appeal court, No. **05-3769**, dismiss petition for *Writ of Mandamus* on Recusal, August 18, 2005.  
RENDELL, FISHER, VAN ANTWERPEN,  
Circuit Judges.

Appeal court, No. **05-1717** and **05-2527**, deny uncontested Rehearing *en banc*, September 19, 2005.  
SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN,  
\*NYGAARD, Circuit Judges.

\*Judge Nygaard's vote is limited  
to panel rehearing only.

## **JURISDICTIONAL STATEMENT**

### **Orders to be Reviewed**

Appeal court, No. 05-3769, August 18, 2005  
Appeal court, 05-1717 / 05-2527, September 19, 2005

### **Statutes Conferring Jurisdiction**

Rules of the Supreme Court of the United States:

Rule 10(a) The Third Circuit Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Rule 10(c) The Third Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 11 A review of the pleadings will show that this case is of such imperative public importance as to require immediate determination in this Court.

Rule 12.4 Petitioner seeks review on two judgments to the same court and involve identical or closely related questions.

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make.  
U.S.C.A. Const. Art. III s2, cl.2.

Case review by *Certiorari*. 28 U.S.C. §1254 (1988).

U.S. Const. Amend. XIV, section 1.

42 Pa. C.S. s8371

PA Rules of Professional and Judicial Conduct.

PA and Federal rules of civil procedure.

### Statement of the Case

#### Preemption of 42 Pa. C.S. s8371 Bad Faith Law

A panel of this appeal court preempted a bad faith insurance claim based on policy language in an employer's disability policy. Barber v. Unum Life Ins. Co. of America, 383 F.3d 134 (3d Cir. 2004). The lower courts here affirmed ERISA preemption of Petitioner's bad faith claim based on policy language.

Petitioner's medical records and letters from six treating physicians were never considered by Respondent or the lower courts, a departure from precedent in this circuit. Stratton v. E.I. Dupont De Nemours & Co., D.C. No. 02-cv-02131, (3d Cir. 2004); and contrary to the controlling authority from this court: "Plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1967 (2003). Petitioner co-pays for benefits.

Department of Labor regulations requiring *plan* due process have been upheld by this court, in cases where medical insurance claims have been preempted. Aetna Health Inc. v. Davila, 539 U.S. 986, 124 S.Ct. 2488 (2004). Respondents' 'draft' plan is unenforceable, raising questions of fact:

- 1) Whether the 'draft' plan was qualified; and
- 2) Whether the plan offers procedures that afford a reasonable opportunity for full and fair review of dispositions adverse to claimants.

See *Petition for Reconsideration*, Appendix II, 18.

Petitioner filed the bad faith claim and Motion for Summary Judgment in state court. Appendix II, 75/91. "Preemption applies to a state statute if it provides a form of ultimate relief in a judicial forum." Barber at 140. Respondent filed for Removal, Appendix III, 53.



**Scheibler v. Highmark**  
**Count I ERISA**  
**Count II 42 Pa. C.S. s8371 Bad Faith**

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Complaint filed December 23, 2004, 04-cv-1928;  
Motion to Dismiss January 13, 2005;  
Order on Motions Practice January 14, 2005;  
Dismissal granted February 1, 2005;  
Reconsideration denied, March 11, 2005;  
Appealed at No. **05-1717**.

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Uncontested petition to amend April 10, 2005;  
Petition to amend denied April 13, 2005;  
Uncontested petition for reconsideration;  
Petition for reconsideration denied April 25, 2005;  
Appealed at No. **05-2527**;

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Order to file statement jurisdiction March 18, 2005;  
Order *sua sponte* consolidated **05-1717 / 05-2527**;  
and dismissed both appeals;  
Sloviter, Fuentes, Nygaard, Circuit Judges.

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Motion for Judicial Recusal opposed;  
*Writ of Mandamus* uncontested;  
Mandamus motion denied August 18, 2005;  
By second panel at No. **05-3769**;  
Rendell, Fisher, Van Antwerpen, Circuit Judges.

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Uncontested petition rehearing *en banc*;  
Rehearing *en banc* denied; September 19, 2005  
Present: Scirica, Chief Judge, Sloviter, Alito, Roth,  
McKee, Rendell, Barry, Ambro, Fuentes, Smith,  
Fisher, VanAntwerpen, Nygaard\*, Circuit Judges.  
**\*J. Nygaard's vote limited to panel rehearing only.**

## **Medical Insurance Claim**

Respondent acknowledged it received a January 2004 request for payment approval of Petitioner's medically necessary surgery.

Treating physician letters attributed Petitioner's need for oral surgery to extensive radiation treatments that administered for his tonsillar carcinoma and said surgery was medically necessary.

In a letter to Respondents, Dr. Rendulich attributed William Scheibler's caries to *xerostomia*:

"Radiation induced caries should be treated as a late effect medical condition resulting from radiation therapy. Having hyperbaric oxygen prior to dental extractions would significantly decrease his risk of *osteoradionecrosis*, which, as you know, can be quite extensive in nature, resulting in the loss of jaw and Significant dysfunction and deformity, requiring multiple operations to correct." See Appendix II, 2.

Respondent approved coverage for pre-op and post-op hyperbaric oxygen treatment and Petitioner traveled forty miles each way [Monday through Friday - four weeks] to hospital treatments, preparing for extraction surgery. Respondent refused to pay for 'office surgery' extraction and Petitioner appealed.

Respondents callously placed its insureds in a medical and economic state of emergency by denying a reasonable request for medically necessary surgery.

Respondents know that Petitioner's evidence will prove this assertion and attempts to cap its liability under the ambit of ERISA, by moving to preempt the insurance claim brought under the - Pennsylvania Bad Faith Statute, a cause of action to recover punitive damages.

### **Summary of the Argument**

Respondent denied payment based on policy language and did no individual review of Petitioner's medical records. Lower court orders here effectively:

- a) Affirmed policy language as controlling, over claimant's evidence of medical necessity;
- b) Departed from precedent, prejudiced claimant;
- c) Failed to apply arbitrary & capricious standard of review, and affirmed inconsistent fiduciary decisions on Petitioner's medical evidence;
- d) Inequitably denied Petitioner the interlocutory jurisdiction it exercised in Barber to review 42 Pa. C.S. s8371, the same state law;
- e) Failed to exercise pendent jurisdiction, pursuant to ERISA's saving clause exception;
- f) ERISA participant bad faith claim inequitably barred; as non-plan claimants are not barred;
- g) Denied Petitioner's statutory due process on bad faith claim, a 14<sup>th</sup> Amendment violation;
- h) Contradicted Highmark's pleading Answers: [5. Contract - 6. Denied it is ERISA insurer.]

Respondents' state reimbursement subsidy is a factor warranting a fiduciary review, where it is alleged that subsidized medical services were paid/unsubsidized services were denied, on same coverage and claim, an unlawful restraint on Petitioner's medical care.

Judicial recusal denied, warrants procedural review.

### **Argument**

State interest in regulating insurance extends beyond Petitioner's claim. Malpractice rates for physicians will rise exponentially if courts override the ERISA saving clause to preempt a neutral statute regulating insurance. This statute was enacted fifteen years after ERISA, as a civil enforcement deterrent:

"...mandating accountability on the part of all insurance companies for any frivolous or unfounded refusal to provide coverage in accordance with an applicable policy of insurance." 42 Pa.C.S. s8371.

#### **I. Preemption of Petitioner's Insurance Claim constituted a 14<sup>th</sup> Amendment violation.**

Respondent acknowledged receipt of medical necessity letters from Petitioner's treating physicians yet denied coverage offering no evidence of a medical basis for denial. This appeal court elected to preempt a state insurance claim, waiving appellate jurisdiction, which effectively affirmed the Respondents' denial of coverage, contrary to material factors. Respondents' decision is unsupported by medical evidence and lacked medical review or alternatives, it cited no appeal procedure, and made conflicting payments. There is no evidence, documentary or in practice, of Respondents' standing as a qualified ERISA *plan*, an unwelcome departure from precedent in this circuit; Stratton v. E.I. Dupont De Nemours & Co., D.C. No. 02-cv-02131, (3d Cir. 2004); contrary to controlling authority from this court: "*Plan* administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1967 (2003). Respondents' standing and failure to comply with ERISA labor regulation; and Petitioner's statutory due process are issues that merit review. Aetna v. Davila, 539 U.S. 986 (2004).